BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRANDON J. HORNSETH	)	
Claimant	)	
VS.	)	
	)	
SALINE COUNTY	)	Docket No. 1,054,381
Respondent	)	
AND	)	
	)	
KANSAS WORKERS RISK COOP FOR COUNTIES	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 7, 2013, Post-Award Medical Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on July 26, 2013.

APPEARANCES

Kelly W. Johnston of Kechi, Kansas, appeared for claimant. Jared T. Hiatt of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board is listed in the May 7, 2013, Post-Award Medical Award.

ISSUES

This is a post-award medical and attorney fees matter. In the May 7, 2013, Post-Award Medical Award, ALJ Moore determined claimant failed to prove that the services of Dr. Dennis Woodall were objectively unsatisfactory and declined to grant claimant's request for medical treatment with Dr. David Harris. The ALJ also denied claimant's request for post-award attorney fees.

Claimant asserts Dr. Harris should be appointed to provide care and treatment for claimant's chronic low back pain. Claimant argues that the correct test for determining post-award liability for medical care is K.S.A. 2010 Supp. 44-510k, not K.S.A. 2010 Supp. 44-510h. Claimant requests the Board determine his request for authorization of Dr. Harris using the proper statutory test or, instead, remand the matter to the ALJ with instructions to use only K.S.A. 2010 Supp. 44-510k in the analysis. While claimant does not believe it is necessary under K.S.A. 2010 Supp. 44-510k to demonstrate dissatisfaction with the services of Dr. Woodall, claimant submits good faith dissatisfaction has been shown. With regard to his request for attorney fees, claimant maintains the ALJ erred in failing to award said fees and submits that an award of attorney fees is reasonable, even if not required by statute.

Respondent requests the Board affirm the Post-Award Medical Award. Respondent maintains the ALJ's ruling denying authorization of Dr. Harris as claimant's treating physician should be affirmed. Respondent maintains K.S.A. 2010 Supp. 44-510k relates to disputes about medical treatment, not medical providers and, therefore, K.S.A. 2010 Supp. 44-510h is the proper statute to apply to claimant's request for Dr. Harris' authorization. Respondent contends it has conscientiously complied with claimant's requests for medical treatment and, therefore, the ALJ's denial of attorney fees should be affirmed.

The issues before the Board on this appeal are:

1. Is the post-award medical treatment requested by claimant necessary to cure or relieve the effects of his accidental injury?

2. Should claimant be awarded attorney fees?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

Dr. David Harris testified that claimant should receive conservative pain management, including prescriptions of Cymbalta, Tizanidine and Robaxin. Dr. Harris also recommended that claimant undergo periodic office examinations and his blood chemistries and reactions to the prescription drugs be monitored. Dr. Harris indicated that he did not currently recommend a spinal stimulator for claimant, but it was a future possibility. He indicated it was reasonable for claimant to pursue a second opinion as to whether a repeat microdiscectomy may be of benefit.

When Dr. Harris testified, he was unaware that claimant had been seen by Dr. Michael J. Johnson, an orthopedic physician, upon a referral from Dr. Dennis Woodall.

Dr. Harris indicated he had no problem with Dr. Woodall providing claimant conservative treatment and stated, "It certainly would make more sense for their [claimant's] chronic pain medication to be monitored by a family physician or somebody who is going to see them regularly."[1] Dr. Harris indicated that he would first want to make sure claimant was stable. He stated claimant was stabilized several months ago, then got worse.

Dr. Johnson saw claimant on one occasion and did not have claimant's records from Dr. Harris or Dr. Matthew Henry, who performed claimant's back surgery following his work accident. Dr. Johnson testified claimant had a TENS unit and it would be appropriate for claimant to continue using the TENS unit. Dr. Johnson recommended that claimant continue taking his current medications – methocarbamol, Cymbalta and Lortab – but to decrease or stop long-term use of Lortab. He also recommended claimant use over-the-counter Tylenol and heat as needed. He did not see anything on claimant's MRI that would indicate he needed another surgery. Dr. Johnson testified that he had no reason to believe that Dr. Woodall could not handle claimant's conservative treatment.

Dr. Woodall did not testify.

PRINCIPLES OF LAW AND ANALYSIS

1. Is the post-award medical treatment requested by claimant necessary to cure or relieve the effects of his injury?

Claimant asserts that he does not have to show the services of Dr. Woodall are unsatisfactory in order to be awarded post-award medical treatment by Dr. Harris. Claimant asserts that under K.S.A. 2010 Supp. 44-510k, respondent has no presumptive right to select an employee's authorized health care provider. However, claimant contends he objectively proved the services of Dr. Woodall were not satisfactory.

K.S.A. 2010 Supp. 44-510k(a) states:

> At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any

[1] Harris Depo. at 32.

> disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

Dr. Woodall, at respondent's expense, has been providing claimant conservative treatment using medications. Drs. Harris and Johnson opined conservative treatment for claimant using medications was appropriate and neither of them testified that the medical treatment Dr. Woodall provided claimant was unsatisfactory. Claimant testified he was not happy with the medications he was provided by Dr. Woodall. Dr. Harris testified that it would make sense for claimant's family physician to monitor his conservative treatment and Dr. Johnson indicated there was no reason why Dr. Woodall could not provide claimant's conservative treatment.

A treating physician's services are not unsatisfactory merely because a claimant does not agree with the course of treatment or does not like the physician. In *Eaton*,[2] in a post-award medical proceeding, Eaton requested medical treatment from Dr. Williams. Schwan's authorized medical treatment for Eaton with Dr. Shafer, Dr. Williams' partner. Eaton, however, was dissatisfied with Dr. Shafer, because of having to see the plant nurse before seeing Dr. Shafer. Eaton also did not have confidence in Dr. Shafer based upon his prior experience with him. The Board stated it could not be said that respondent refused to provide claimant with authorized medical treatment, stating:

> Under the Kansas Workers Compensation Act, the employer is responsible for providing medical care to an injured worker for the work-related injuries. The Act further provides that the employer has the right to direct that medical care in the first instance by naming the authorized provider or providers. That right does not end with the entry of an award. K.S.A. 2009 Supp. 44-510h gives the employee an avenue for seeking a change of physician if it is shown that the services of the health care provider furnished by the employer is not satisfactory. . . . Even Dr. Williams acknowledged that Dr. Shafer is competent to treat claimant for his work-related headaches.

At oral argument, claimant asserted that it is the fact finder's responsibility to look at the treatment proposed by Drs. Harris and Woodall and then to select the physician who will provide claimant the **best** treatment. The Board rejects that legal analysis, as K.S.A. 2010 Supp. 44-510k and 2010 Supp. 44-510h only require respondent provide medical treatment that is necessary to cure or relieve claimant of the effects of his accidental injury. Moreover, if claimant's legal analysis were adopted, the fact finder in every post-award medical proceeding would be placed in the position of determining what treatment was "best" for claimant. The medical treatment claimant requested was already being provided

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[2] *Eaton v. Schwan's Home Service, Inc.*, No. 1,041,298, 2011 WL 494964 (Kan. WCAB Jan. 31, 2011).

by Dr. Woodall. Drs. Harris and Woodall recommended conservative medical treatment using prescription drugs to relieve the effects of claimant's accidental injury. There is insufficient evidence in the record that Dr. Woodall's medical treatment was not relieving the effects of claimant's accidental injury. Therefore, the Board finds the medical treatment requested by claimant was not necessary to cure or relieve the effects of his accidental injury.

Claimant alleges the ALJ erroneously relied upon K.S.A. 2010 Supp. 44-510h, instead of K.S.A. 2010 Supp. 44-510k, to analyze and reject claimant's request for post-award medical treatment. In *Eaton*, cited above, the Board indicated a claimant may use K.S.A. 2010 Supp. 44-510h in a post-award medical proceeding to request a change of physicians. In *Brumbaugh*,[3] an appeal from a post-award medical proceeding, the Kansas Court of Appeals stated:

> Atria's argument focuses on the preaward standard for medical care to be "reasonably necessary" as stated in K.S.A. 2007 Supp. 44-510h(a) and the standard of providing "necessary" care for postaward medical care in K.S.A. 2007 Supp. 44-510k(a) as showing the Board committed reversible error in its ruling allowing Brumbaugh additional medical care.
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> Atria argues there should be a higher standard before postaward medical care should be allowed because (1) an employer should not become a guarantor for every medical problem that occurs in the part of the body injured in a workplace; and (2) a claimant has reached maximum medical improvement at the time of the initial award and only "necessary" care should be allowed thereafter.
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> . . . .
>
> We reject Atria's claim that a higher burden is required for postaward treatment. We do not believe that the legislature intended for different levels of medical attention to be made available to injured workers in the pre or postaward situation. The administrative problems of such a ruling would present horrendous perplexity to health care providers in their testimony and to the administrative law judge and Board in attempting to apply two different standards.

In *Lickteig*,[4] a post-award medical proceeding, Lickteig sought medical treatment for her work-related injury. The Kansas Court of Appeals stated that under K.S.A. 2006 Supp. 44-510h an employer has a duty to provide medical services and treatment to an injured employee that "may be reasonably necessary to cure and relieve the employee from the

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[3] *Brumbaugh v. Atria Hearthstone*, No. 99,317, 2008 WL 4472256 (Kansas Court of Appeals unpublished opinion filed Oct. 3, 2008).

[4] *Lickteig v. Ottawa Retirement Village*, No. 96,731, 2007 WL 737962 (Kansas Court of Appeals unpublished opinion filed March 9, 2007).

effects of the injury." In the next sentence of its opinion, the Kansas Court of Appeals cited K.S.A. 2006 Supp. 44-510k.

The language used by the Kansas Court of Appeals in *Brumbaugh* and *Lickteig* supports the premise that K.S.A. 2010 Supp. 44-510k and 2010 Supp. 44-510h apply to post-award medical proceedings. *Brumbaugh* requires a respondent, whether pre- or post-award, to provide a claimant with medical care that is necessary to cure or relieve the effects of his or her accidental injury. Accordingly, the Board finds that K.S.A. 2010 Supp. 44-510k and 2010 Supp. 44-510h apply to post-award medical proceedings.

Even if K.S.A. 2010 Supp. 44-510h does not apply to post-award medical proceedings, the Board would affirm the ALJ's Post-Award Medical Award. Under K.S.A. 2010 Supp. 44-510k, the ALJ has an obligation to determine if the medical treatment requested by claimant is necessary to cure or relieve the effects of his accidental injury and then **can** order the medical treatment. By finding there was no objective evidence that Dr. Woodall's services were unsatisfactory, ALJ Moore impliedly found Dr. Woodall's medical treatment was sufficient to relieve the effects of claimant's back injury. Claimant failed to prove, as required by K.S.A. 2010 Supp. 44-510k, that the medical treatment recommended by Dr. Harris was necessary to cure or relieve the effects of claimant's accidental injury.

2. Should claimant be awarded attorney fees?

K.S.A. 2010 Supp. 44-510k(c) states:

> The administrative law judge **may** award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs. (Emphasis added.)

K.S.A. 44-536(g) provides:

> In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney

> fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director **may** authorize a fee to be paid by the respondent. (Emphasis added.)

The Board adopts ALJ Moore's Analysis and Conclusions of Law on the issue of attorney fees. Respondent, as did the employers in *Naff*[5] and *May*,[6] provided the claimant medical care. The dispute in the present claim, as in *Naff*, was over which physician would provide claimant medical treatment, not whether the respondent would provide medical treatment for claimant.

Further, K.S.A. 2010 Supp. 44-510k(c) states the ALJ **may** award attorney fees on claimant's behalf consistent with K.S.A. 44-536(g). K.S.A. 44-536(g) provides that if the legal services rendered result in a denial of additional compensation, the director **may** authorize a fee to be paid by the respondent. The ALJ denied claimant's request for additional medical benefits. Therefore, the ALJ had the option under K.S.A. 2010 Supp. 44-510k(c) and K.S.A. 44-536(g) to grant or deny claimant's request for attorney fees, and chose to deny the request. Accordingly, the Board affirms the ALJ's finding that claimant is not entitled to attorney fees.

CONCLUSION

1. Claimant's request for additional medical treatment by Dr. Harris is denied.

2. Claimant's request for attorney fees is denied.

WHEREFORE, the Board affirms the May 7, 2013, Post-Award Medical Award entered by ALJ Bruce E. Moore.

IT IS SO ORDERED.

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[5] *Naff v. Davol, Inc.*, 28 Kan. App. 2d 726, 20 P.3d 738, *rev. denied* 271 Kan. 1037 (2001).

[6] *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

Dated this ____ day of September, 2013.

BOARD MEMBER

BOARD MEMBER

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Honorable Bruce E. Moore, Administrative Law Judge